

Exhibit 34
(Redacted)
(Previously Filed Under Seal as Dkt. 415)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEFENDANTS.

BROOKS HILLIARD

34

By Brandi Bigalke, RPR

Fair Isaac Corporation vs. Federal Insurance Company, et al.

1 cases multiple licenses.
 2 Also in the consulting environment
 3 there were often multiple software licenses. If
 4 there were multiple, and in most cases there
 5 were, companies making proposals to my clients, I
 6 in many cases reviewed the licenses of more than
 7 just the desired or selected provider.
 8 So while I say -- and perhaps 150
 9 of those instances involved analyzing and
 10 negotiating software licenses, in many of those
 11 150 I analyzed multiple software licenses, and in
 12 some of them I was involved in negotiation of
 13 multiple software licenses.
 14 Q. In connection with your statement
 15 about your professional involvement in analyzing,
 16 drafting, and/or negotiating several hundred
 17 software licenses, what types of software are you
 18 referencing?
 19 **A. Business-oriented software.**
 20 Q. Such as what?
 21 **A. Many of them are what would be**
 22 called enterprise software, which touches many
 23 areas within a business from operations to
 24 accounting to administrative. Many of them were
 25 specialized software for particular business applications. Virtually all of them were
 2 business related -- business software -- related
 3 to business software rather than technical
 4 software or software oriented toward say
 5 controlling equipment or system software.
 6 Although there was some of that.
 7 Q. With respect to your statement
 8 about your professional involvement in analyzing,
 9 drafting, and/or negotiating several hundred
 10 software licenses, did any of those licenses
 11 involve rules management software?
 12 **A. Yes.**
 13 Q. Could you identify those?
 14 **A. The one that comes to mind is an**
 15 ongoing case that's covered by a protective order
 16 that I can't talk about, but most of them involve
 17 rules management relating to configuration. It
 18 could be configured to order manufacturing, it
 19 could be configuration relating to distribution
 20 of products.
 21 So there would be rules as to what
 22 product can go with what product, or if you buy
 23 this one you have to buy that one, and you can't
 24 get that one because it doesn't work with it. So
 25 most of them were configuration management rules

Page 33

Page 34

1 that I recall.
 2 Q. In the case that you referenced
 3 involving protective order, who were you retained
 4 by?
 5 **A. I was retained by a firm called**
 6 AZA, Anaipakos something. This --
 7 Q. Is this -- go ahead.
 8 **A. They're very lengthy names. The**
 9 firm goes by the name of AZA.
 10 Q. What does that stand for?
 11 **A. Anaipakos I believe is the name of**
 12 the first individual. The second and third
 13 individuals, one's last name begins with Z and
 14 the next one begins with A.
 15 Q. And who -- what is the party on the
 16 opposite side of that lawsuit?
 17 **A. Pardon me?**
 18 Q. Could you identify the party on the
 19 other side of that lawsuit?
 20 **A. Ford Motor Company.**
 21 Q. Where is that lawsuit venued?
 22 **A. Detroit.**
 23 Q. Do you know whether it's state
 24 court or federal court?
 25 **A. Federal.**
 1 Q. Do you know who the judge is?
 2 **A. No.**
 3 Q. Who are the attorneys for AZA?
 4 **A. They've changed over a period of**
 5 time. AZA is the law firm, not the litigant. I
 6 was engaged by the law firm. And the one
 7 constant is a Mr. Mitby. Steven Mitby,
 8 M-I-T-B-Y.
 9 Q. Who does AZA represent in that
 10 case?
 11 **A. A company called Versata,**
 12 V-E-R-S-A-T-A.
 13 Q. What is the subject matter of that
 14 lawsuit?
 15 **A. It's an intellectual property,**
 16 trade secret -- well, there are a number of
 17 issues. My issues were related to trade secret.
 18 Q. Does it involve software licenses?
 19 **A. Yes.**
 20 Q. Do you provide any -- have you
 21 provided any opinions in that case relating to
 22 software licenses?
 23 **A. I haven't provided any opinions in**
 24 that case. I was a consulting expert.
 25 Q. So in that case did you prepare an

Page 35

Page 36

Fair Isaac Corporation vs. Federal Insurance Company, et al.

<p>1 expert report?</p> <p>2 A. No.</p> <p>3 Q. In this case would you say that</p> <p>4 analyzing comparable software licenses is</p> <p>5 relevant to your task?</p> <p>6 A. Would I say that analyzing software</p> <p>7 licenses is relevant, yes.</p> <p>8 Q. Would you say that analyzing</p> <p>9 comparable software licenses is relevant to your</p> <p>10 task?</p> <p>11 A. In terms of knowledge of what</p> <p>12 comparable -- what is in comparable software</p> <p>13 licenses, yes, very relevant.</p> <p>14 Q. How so?</p> <p>15 A. Well, because in many cases my</p> <p>16 opinions deal with what is normal and customary</p> <p>17 in software licenses for in -- for similar</p> <p>18 specially purpose and general purpose business</p> <p>19 software.</p> <p>20 Q. What experience do you have with</p> <p>21 regard to the performance of obligations due</p> <p>22 under a software license agreement?</p> <p>23 MR. HINDERAKER: Object to the</p> <p>24 question as vague.</p> <p>25 THE WITNESS: I don't understand</p>	<p>1 last, I think it's four years that are required</p> <p>2 by the rule are in your possession.</p> <p>3 MR. FLEMING: Go ahead.</p> <p>4 THE WITNESS: I'd be happy to</p> <p>5 address the cases on page 37 of my report, which</p> <p>6 are the ones within the past four years.</p> <p>7 And could you ask the question</p> <p>8 again, or could we read back the question so that</p> <p>9 I'm answering it specifically.</p> <p>10 MR. HINDERAKER: Sure.</p> <p>11 (Whereupon, the requested portion</p> <p>12 was read back by the reporter.)</p> <p>13 THE WITNESS: Could you read the</p> <p>14 prior question. When you say "those cases," I --</p> <p>15 cases relating --</p> <p>16 (Clarification by the court</p> <p>17 reporter.)</p> <p>18 MR. FLEMING: You have to go to the</p> <p>19 question before that.</p> <p>20 THE WITNESS: The prior question, I</p> <p>21 think.</p> <p>22 (The requested portion was read</p> <p>23 back by the court reporter.)</p> <p>24 THE WITNESS: I'm trying to</p> <p>25 remember the details of the cases. The</p>
<p>1 what you're asking me.</p> <p>2 BY MR. FLEMING:</p> <p>3 Q. Have you provided -- have you</p> <p>4 worked as an expert witness in any case involving</p> <p>5 the question as to a party's obligations under a</p> <p>6 software license agreement?</p> <p>7 MR. HINDERAKER: Same objection,</p> <p>8 vagueness.</p> <p>9 THE WITNESS: In a general sense,</p> <p>10 many of the cases involved what was in the</p> <p>11 software license, as well as the actions of the</p> <p>12 licensor and licensee.</p> <p>13 As best I understand your question,</p> <p>14 that's the most relevant answer I can give you.</p> <p>15 BY MR. FLEMING:</p> <p>16 Q. And you're referencing cases in</p> <p>17 which you've testified as an expert?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Can you identify those</p> <p>20 cases?</p> <p>21 MR. HINDERAKER: I'm going to</p> <p>22 object to the question to the extent it's asking</p> <p>23 for disclosures that are beyond Rule 26. And</p> <p>24 Mr. Hilliard's disclosures and conformance with</p> <p>25 Rule 26 regarding his prior experience over the</p>	<p>1 Hodel-Natco dealt with SAP's -- SAP America's</p> <p>2 involvement in performance of services under a --</p> <p>3 there may have been an implementation contract</p> <p>4 rather than a software license. I don't know</p> <p>5 that there were licensing issues, but there may</p> <p>6 have been.</p> <p>7 State Controller's Office versus</p> <p>8 SAP Public Services was an implementation</p> <p>9 contract. I reviewed the software license, but I</p> <p>10 don't believe that there were software licensing</p> <p>11 issues there.</p> <p>12 The Gish versus Meisenheimer did</p> <p>13 not have any.</p> <p>14 The QAD versus Ingersoll-Rand did</p> <p>15 involve software licensing issues, although I</p> <p>16 don't recall specifically off the top of my head</p> <p>17 what they were.</p> <p>18 And the Armour Capital Management</p> <p>19 versus SS&C Technology involved, as I recall,</p> <p>20 both software licensing and implementation</p> <p>21 issues.</p> <p>22 BY MR. FLEMING:</p> <p>23 Q. So do you recall any cases in which</p> <p>24 you've testified as an expert witness relating to</p> <p>25 a party's obligations under a software license</p>

Fair Isaac Corporation vs. Federal Insurance Company, et al.

<p>1 A. I would expect there to be some 2 negotiation, and that the negotiation to be based 3 on -- on the parameters that the licensor 4 normally uses for setting fees and discussions 5 between the licensor and licensee, which may or 6 may not address the usage. 7 Q. So you would not expect a software 8 licensor in FICO's position in 2016 to request 9 some information about how the licensee was using 10 the software prior to demanding an increased fee, 11 correct? 12 MR. HINDERAKER: Objection; 13 misstates the testimony. 14 THE WITNESS: I'm saying I would 15 expect there to be some discussion. I would 16 think that that would come up in the discussion. 17 The imperatives in your question, the demanding 18 and so forth, it wouldn't -- normally there's a 19 good business relationship, and it's not an 20 imperative and a demanding kind of situation as 21 you've described it. And I would expect that to 22 come up, but I don't know necessarily that it 23 would always have to come up. 24 BY MR. FLEMING: 25 Q. Are you saying that FICO was</p>	<p>1 late. We've been going a long time today, but -- 2 MR. HINDERAKER: Almost seven 3 hours. 4 BY MR. FLEMING: 5 Q. Continuing to say the contract says 6 what it says is not responsive to my question, 7 and I'd like an answer. 8 Is it your opinion that FICO was 9 entitled to an increased licensing fee whether or 10 not there was any change in the way Blaze was 11 being used as a result of the merger? 12 A. I believe the contract says that 13 FICO was entitled to do that, and I feel that 14 FICO was entitled to rely on what the contract 15 said. 16 Q. The contract says that they were 17 entitled to an increased licensing fee, is that 18 what you're saying? 19 A. The contract says that there is -- 20 that consent is required, that there is no 21 assignment without consent, and the normal way 22 that consent occurs in situations where one -- as 23 Landy and Classen agree, the normal way in 24 situations where there is an acquisition by a 25 much larger entity that increases in license fees</p>
<p>1 entitled to an increased licensing fee whether or 2 not there was any change in the way Blaze was 3 being used as a result of the merger? 4 A. I'm saying that the contract says 5 what it says with regard to that, and what it 6 says is normal and customary. 7 Q. No, I'm asking whether you believe 8 that FICO was entitled to an increased licensing 9 fee whether or not there was any change in the 10 way Blaze was being used as a result of the 11 merger? 12 A. I believe that would be that what 13 FICO did was normal and customary. I believe 14 that the discussions over increased licensing 15 fees are normal and customary, and that the 16 contract says what it says, and it would be 17 normal and -- regarding the consent for 18 assignment and the way that FICO dealt with Chubb 19 in that regard was consistent with what the 20 contract said, and was normal and customary in 21 the industry. 22 I think I cited both Landy and 23 Classen in that regard, as well as my own 24 experience. 25 Q. Mr. Hilliard, I know it's getting</p>	<p>1 are normal and customary regardless of use. 2 Q. On page 22 of your report you state 3 that as negotiations between FICO and Chubb 4 continued in 2016, FICO learned of several 5 installations of the Blaze Advisor software that 6 had previously been done outside of the United 7 States, right? 8 A. Yes. 9 Q. And you reviewed Dr. Kursh's report 10 relating to the documents he referred to in 11 connection with FICO's prior knowledge of foreign 12 use, right? 13 A. I reviewed Dr. Kursh's report in 14 that regard, yes. 15 Q. How can you claim that FICO just 16 learned of this foreign use in 2016? 17 That's not accurate, is it? 18 A. It had learned of some prior to 19 2016. There was use, but it didn't necessarily 20 learn of all of the installation until 2016, 21 which would have been the unlicensed use. And I 22 think there was actually a specific new -- at 23 least one specific new incidence of unlicensed 24 installation or of installation outside the 25 United States that FICO was not aware of, at</p>

Fair Isaac Corporation vs. Federal Insurance Company, et al.

1 least one, that it didn't become aware of until
2 2016.

3 Access to the software without the
4 installation of the software outside the U.S.
5 would not necessarily have been contrary in
6 violation of the license. And I don't know
7 whether it was 2016 or exactly when -- I don't
8 recall exactly when FICO became aware of
9 installations not permitted by the license, or
10 the date at which FICO became aware of disclosure
11 of the software through consultants that aren't
12 specifically named in Section 3.6 of the license
13 agreement. I think at least one of those
14 instances occurred in 2016.

15 Q. Throughout your report you use the
16 phrase "consistent with the normal customs and
17 practices of the commercial software industry."
18 How is that any different than the
19 phrase that Dr. Kursh uses which is
20 "commercially reasonable"?
21 A. It's very different. The
22 difference is that in my case it is based on my
23 experience backed up by learned treatises,
24 third-party sources that confirm my experience.
25 And it's evaluable not only on my experience, Page 233

1 but what the third-party sources say.
2 In Dr. Kursh's case, he refers
3 to -- he attempts to make a definition of what he
4 means by commercially unreasonable, and I think
5 he has three different factors. His experience,
6 the customs and practices of Chubb, the customs
7 and practices of FICO, and I think one other. He
8 doesn't say how they're combined, but he says
9 it's a combination of those three.

10 There's no way to evaluate what he
11 means by that because he's combined so many
12 different things. Whereas I've been very
13 specific about what I mean by customs and
14 practices of the industry, and I've backed it up
15 with third parties.

16 Q. Mr. Hilliard, I'd like to talk
17 about your opinions relating to discounts.

18 A. Certainly.

19 Q. On page 25 of your report you state
20 that FICO's discounting process is consistent
21 with the custom and practices of the commercial
22 software industry.

23 A. Page?

24 Q. 25.

25 A. 25. Yes.

Page 234

1 Q. And you go on to state that the
2 last custom pricing process is exactly what FICO
3 did in developing the license fee quote it gave
4 to Federal in March of 2016 when it offered a
5 discounted fee level of [REDACTED] that
6 right?

7 A. [REDACTED] There were three
8 different proposals that the most -- the one with
9 the greatest discount was [REDACTED]

10 Q. So a [REDACTED] discount would be
11 consistent with industry norms; is that right?

12 A. Discounts vary, but it would -- for
13 a discount for an expanded license with a major
14 client with potential worldwide use, it's
15 certainly within the range that would be normal
16 and customary.

17 Q. On page 23 you summarize
18 Dr. Kursh's opinions on discounts, and you state
19 that Dr. Kursh asserts that the way that FICO
20 determined the license fees it quotes to
21 prospective and current customers is inconsistent
22 with software industry norms, and you go on to
23 state that based on your experience, Dr. Kursh is
24 wrong.

25 Can you summarize your experience Page 235

1 with pricing software similar to Blaze Advisor?
2 A. Certainly. Working as a consultant
3 in over 200 engagements, the vast majority of
4 which were engagements where my clients acquired
5 business software, in some cases special purpose
6 industry oriented business software, in other
7 cases general purposes what's known as ERP
8 software, I was involved in seeing the pricing
9 and discounting that were offered to my clients.

10 And in my work -- and prior to that
11 when I had worked in computer companies, I was
12 involved in decisions on discounting -- now this
13 is some years ago because I've been working as a
14 consultant since 1980, but I was involved in
15 negotiating discounts with clients, so I'm
16 familiar from that experience.

17 And then in work as an expert
18 witness, many of the cases that I've been
19 involved in, the issues in the case related to
20 discounts that were given for business software
21 applications. Some cases special purpose, some
22 cases general purpose.

23 Q. Okay. Mr. Hilliard, we've just got
24 a little bit of time left, but what is your

25 experience with pricing software similar to Blaze Page 236

Fair Isaac Corporation vs. Federal Insurance Company, et al.

<p>1 Advisor? I think you've -- that's the question</p> <p>2 I'd like an answer to.</p> <p>3 A. When I'm referring to similar to</p> <p>4 Blaze Advisor, what I'm referring to is business</p> <p>5 application software. And in some cases that</p> <p>6 would be special purpose business applications</p> <p>7 such as Blaze Advisor. In other cases it would</p> <p>8 be general purpose business application software</p> <p>9 such as, for instance, Oracle Financials or</p> <p>10 PeopleSoft ERP software. PeopleSoft now being a</p> <p>11 part of Oracle. Or Lawson software or others.</p> <p>12 And I'm familiar -- and so all of those would be</p> <p>13 business application software like Blaze Advisor.</p> <p>14 Q. Okay.</p> <p>15 A. And that's what I'm familiar with.</p> <p>16 Q. Would you agree that database</p> <p>17 software is an example of system software, the</p> <p>18 category of software that includes operating</p> <p>19 systems which is entirely different from</p> <p>20 application software like Blaze that perform</p> <p>21 business functions?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. What are some other examples</p> <p>24 of application software in the market today?</p> <p>25 A. Oracle Financials, SAP-1, Lawson's</p>	<p>1 fluid?</p> <p>2 A. I mean that for different</p> <p>3 business -- business software and different</p> <p>4 software licensors, pricing can be very --</p> <p>5 everything from very rigid as it would for</p> <p>6 off-the-shelf consumer software or off-the-shelf</p> <p>7 software that gets installed by businesses with</p> <p>8 no implementation or customization, on up to very</p> <p>9 variable by company and licensor ranging from</p> <p>10 hundreds of dollars to millions of dollars with</p> <p>11 discounts ranging from nothing to a substantial</p> <p>12 portion of list price.</p> <p>13 And you'd have to look at</p> <p>14 individual -- individual software -- markets for</p> <p>15 individual software applications, ERP</p> <p>16 applications. General purpose ERP applications</p> <p>17 might be one thing, special purpose -- and by ERP</p> <p>18 I mean general purpose business software. The</p> <p>19 term ERP means enterprise resource planning. The</p> <p>20 name doesn't connote what it actually is. It's</p> <p>21 a -- comes out historically.</p> <p>22 Q. So did you --</p> <p>23 A. So it just depends on the software.</p> <p>24 But by very fluid I mean the amount of the</p> <p>25 license varies by type of software, and the level</p>
<p>1 ARP software, SAP's R/3. Boy, I mean, Microsoft</p> <p>2 Dynamics. I think there are four -- at least</p> <p>3 three different Microsoft Dynamics' products.</p> <p>4 There are software applications for different</p> <p>5 kinds of professional businesses and so forth.</p> <p>6 The ones I've given you are brand</p> <p>7 name products that you might have heard of.</p> <p>8 Q. What is your understanding as to</p> <p>9 who are the main competitors to Blaze software in</p> <p>10 the marketplace?</p> <p>11 A. Yeah, I looked at the main</p> <p>12 competitors that were listed in the Forester</p> <p>13 report. And as we sit here today, I'm not</p> <p>14 recalling them off the top of my head.</p> <p>15 Q. On page 26 of your report you state</p> <p>16 that commercial software pricing methods are very</p> <p>17 fluid.</p> <p>18 Are you saying it's impossible to</p> <p>19 quantify the market rate for a license in this</p> <p>20 situation?</p> <p>21 A. I don't understand your question.</p> <p>22 What do you mean by the market rate</p> <p>23 for a license?</p> <p>24 Q. What do you mean when you say that</p> <p>25 commercial software pricing methods are very</p>	<p>1 of discounting varies both by type of software</p> <p>2 and by market.</p> <p>3 Q. Did you attempt to determine the</p> <p>4 fair market value of the Blaze software license</p> <p>5 as of 2016 or presently?</p> <p>6 A. I have not attempted to do that,</p> <p>7 no.</p> <p>8 Q. How would you go about doing that?</p> <p>9 A. The fair market value. The fair</p> <p>10 market value is what FICO sells it for to its</p> <p>11 customers. So you'd have to look at the way --</p> <p>12 what price FICO has determined to sell its</p> <p>13 software licenses at, and whether it's able to</p> <p>14 sell substantial numbers of licenses at those</p> <p>15 prices.</p> <p>16 Q. But you have not provided an</p> <p>17 opinion as to the fair market value of the Blaze</p> <p>18 license either as of 2016 or presently, correct?</p> <p>19 A. Correct.</p> <p>20 MR. FLEMING: All right. That's</p> <p>21 all I have.</p> <p>22 MR. HINDERAKER: Okay. I guess I</p> <p>23 have one question.</p> <p>24 EXAMINATION</p> <p>25 BY MR. HINDERAKER:</p>